TAY CHOO FOO

v.

TENGKU MOHD SAAD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[CIVIL SUIT NO: D1-22-1115-2000]
28 JANUARY 2003

CIVIL PROCEDURE: *Parties - Partnership - Acts and omissions prior to coming of existence of defendant as a firm of solicitors - Applicability of O. 77 r. 1, Rules of the High Court 1980 - Whether allegations had bearing on defendant*

CIVIL PROCEDURE: *Pleadings - Striking out writ and statement of claim - Defendants' application to strike out allowed - Appeal against - Whether there was prima facie cause of action - Plaintiff's attempt to place question already pending for adjudication in another court before present court for determination - Whether an abuse of court's process*

This was the sixth defendant's appeal against the decision of the learned Senior Assistant Registrar ('SAR') who dismissed their application to set aside the writ of summons and the service thereof on them pursuant to O. 12 r. 7 of the Rules of the High Court 1980 ('RHC') [hereinafter 'first appeal]. The other application herein concerned the plaintiff's appeals against the decision of the SAR in allowing the first to fourth defendants', the fifth defendant's and the sixth defendant's applications respectively to strike out the writ of summons and statement of claim pursuant to O. 18 r. 19(1)(a), (b) & (d) of the RHC [hereinafter collectively referred to as the 'second appeal'].

Held:

[1] Regarding the first appeal, the substance of the plaintiff's case concerned the acts and omissions prior to the coming into existence of the sixth defendant as a firm of solicitors. As such, under O. 77 r. 1 of the RHC, the allegations had no bearing on the sixth defendant and as a result, the sixth defendant's appeal was allowed. (pp 297 h-i & 298 a-c)

[2] With respect to the second appeal, the plaintiff was seeking, *vide* this present suit, to have this court determine the validity of a certain undertaking given in another suit, *ie* civil suit no. D3-22-4408-98 ('D3'). However, any such determination should rightly be in the D3 suit. (pp 297 d-e & 299 b)

[2b] Having chosen not to challenge the validity of the undertaking in the D3 suit, the plaintiff's act of commencing this present suit is an abuse of the court's process. This was merely the plaintiff's attempt to place a question which was already pending for adjudication in another court, before this court for determination. Furthermore, there was nothing in the statement of claim to show that the plaintiff had a *prima facie* cause of action against the fifth and sixth defendants. The plaintiff's pleaded case did not substantiate the inclusion of these two defendants in this suit. The plaintiff should have avoided these subterfuge of filling multiple collateral suits by raising all his allegations by way of a counterclaim in the said D3 suit. On these grounds, the plaintiff's appeals were dismissed. (p 299 c-e)

[Ordered accordingly.]

Case(s) referred to:

Gasing Heights Sdn Bhd v. Aloyah Abdul Rahman [1996] 3 CLJ 695 HC ***(refd)***

Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd [1999] 4 CLJ 533 CA ***(refd)***

Lesco Development Corporation Sdn Bhd v. Malaysia Building Society Bhd [1988] 2 MLJ 184 ***(refd)***

Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed [1998] 2 MLJ 425 ***(refd)***

Supputetchumi v. Palmco Bina Sdn Bhd [1994] 2 CLJ 561 HC ***(foll)***

Permodalan Plantations Sdn Bhd v. Rachuta Sdn Bhd [1985] 1 MLJ 157 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 12 r. 7, O. 14, O. 18 r. 19(1)(a), (b), (d), O. 77 r. 1

For the appellant/plaintiff - Joseph Yeo; M/s Joseph Yeo

For the respondents/defendants - G Rajasingam; M/s Shearn Delamore & Co

Reported by Raja Vishnu Sivarajah

JUDGMENT

Vincent Ng J:

Preamble

Before me:

(i) the sixth defendant's appeal, *vide* encl. 42, against the decision of the learned Senior Assistant Registrar (SAR) dated 19 April 2001, dismissing

prayer 1 of their application (encl. 20) to set aside the writ of summons and the service thereof on them pursuant to O. 12 r. 7 of the Rules of the High Court 1980 (RHC) (the first appeal); and

(ii) the plaintiff's appeals, *vide* encls. 48, 49 & 50, against the decision of the learned SAR dated 11 February 2002, allowing the first to fourth defendants', the fifth defendant's and the sixth defendant's applications respectively *vide* encls. 20, 36 & 38 to strike out the writ of summons and statement of claim pursuant to O. 18 r. 19(1)(a), (b) & (d) of the RHC 1980 (collectively referred to as the second appeal).

The Protagonists

In order to ensure a fair determination of these appeals, it is necessary to identify the role of each party in these proceedings.

The plaintiff in this suit is the defendant in Civil Suit No: D3-22-4408-98 (the D3 suit) brought by the first to fourth defendants in relation to the beneficial ownership of 1.2 million shares in Harrisons Holding (M) Bhd (Harrisons) and the dividends payable upon them. The D3 suit was filed by the M/s Khaw & Hussein, a sole proprietorship with Ms Kaw Yew Mei as the proprietor.

At some point in the D3 proceedings, plaintiff gave an undertaking not to dispose of the shares and to keep the dividends declared on the same in an interest bearing account. For their part, the first to fourth defendants were to expedite the various interlocutory applications and to have the matter set down for trial as soon as possible. A consent order to that effect was recorded on 4 February 1999.

The fifth defendant is the solicitor acting for the said defendants whilst the sixth defendant is the firm of solicitors on record in the D3 suit.

The plaintiff's claim in the present suit is for, amongst other reliefs, a declaration that the plaintiff is no longer bound by the undertaking given to the first to fourth defendants in the D3 suit as the defendants failed to expedite setting down the matter for trial. It is noteworthy that the D3 suit is still pending.

The First Appeal

It is undisputed that the sixth defendant was founded on 1 June 1999 and is made up of six partners including Ms Kaw Yew Mei.

I find that the gist of the plaintiff's claim in the present suit concerns acts and omissions prior to the coming into existence of the sixth defendant as a

firm of solicitors. For this reason, I hold that the plaintiff's claim against the sixth defendant untenable and misconceived in law.

Support can be had in O. 77 r. 1 of the RHC which provides that:

> Subject to the provisions of any written law, any two or more persons claiming to be entitled, or **alleged to be liable, as partners** in respect of a cause of action and carrying on business within the jurisdiction **may** sue or **be sued, in the name of the firm (if any) of which they are partners at the time when the cause of action accrued**. (emphasis added)

In short, all or any allegations pre 1 June 1999 has no bearing on the sixth defendant and for this reason, I allow the sixth defendant's appeal.

The Second Appeal

The defendants' applications to strike out the writ of summons and the statement of claim under O. 18 r. 19(1)(a), (b) and (d) of the RHC are grounded on three reasons, namely that:

(i) there is no reasonable cause of action against them;

(ii) the plaintiff's claim is scandalous and vexatious; and

(iii) the plaintiff's claim is an abuse of the court process.

Before I consider the merits of the plaintiff's appeals, I believe that a brief discussion on the law is in order.

I had the occasion to express the following view on striking out proceedings in *Suppuletchumi v. Palmco Bina Sdn Bhd* [1994] 2 CLJ 561 at 568:

> Thus, O. 18 proceedings whether they be under r. 19(1)(a), (b) or (c) ... are not decided by weighing mere assertions in the affidavits of both the parties. It is trite that the mere assertion in an affidavit of a given situation which is to be the basis of a claim or a defence, does not *ipso facto* provide immunity against the claim or defence from being struck out under r. 19(1)(a), (b) or (c) ...; the court must and ought to look at the whole situation and ask itself whether the plaintiff ... has satisfied the court that he has a *bona fide* or *prima facie* cause of action ... .
>
> It is this court's view that due to the current position of our courts, ... a fresh approach more in keeping with the times should be adopted when considering applications under O. 14 and O. 18 r. 19 of the RHC. The minimum evaluation approach in the past, of affidavit evidence when deciding the issue whether there is a reasonable cause of action, or triable issue in a defence, would give way to the optimum evaluation approach.

Applying the principles adumbrated above and after having the benefit of perusing the affidavits and the submissions of both sides, I hold as follows:

The plaintiff was seeking, *vide* the present suit, to have this court determine the validity of the undertaking given in the D3 suit. Any such determination should rightly be in the D3 suit, a fact known to the plaintiff as he had taken out two separate applications in the D3 suit, to achieve the same result. For reasons best known to the plaintiff, both these applications were subsequently withdrawn without being heard on its merits.

Having chosen not to challenge the validity of the undertaking in the D3 suit, the plaintiff's act of commencing this present suit is an outrageous abuse of the court process. It is a deliberate attempt on the part of the plaintiff to place the question of whether he is at liberty to deal with the shares and receive the dividends payable upon the same – a question already pending adjudication in another court – before me for determination.

Further, there is nothing in the statement of claim to show that the plaintiff is at least clothed with a *prima facie* cause of action against the fifth and sixth defendants. The only nexus between the facts, as pleaded, and the two defendants is that the fifth defendant is the solicitor who has current conduct of the D3 suit for the first to fourth defendants, whilst the sixth defendant is the firm of solicitors on record for the action. Both defendants were acting strictly in accordance with the instructions of their clients. The plaintiff's pleaded case clearly does not justify or substantiate the inclusion of these two defendants in this suit.

It was a revelation that the plaintiff had also moved the court twice in the D3 suit to have the first to fourth defendants' claim struck out. The applications were dismissed by the SAR and when they came up on appeal to the learned judge, he dismissed the same.

The plaintiff had also instituted proceedings *vide* Civil Suit No: D9-22-1344-00 against Harrisons for the dividends payable in respect of the same 1.2 million shares. The presiding judge, Dato' Ramly bin Haji Ali J struck out the suit holding that:

(i) the plaintiff should not be allowed to claim for the dividends when the shares, upon which the dividends were derived, were the subject matter of a pending suit in another court; and

(ii) the undertaking was valid until the D3 suit is disposed of after full trial.

The plaintiff's failure to plead, disclose or make any reference at all to all these material facts is scandalous, and speaks ill of his *bona fides* in his approach to this court.

The plaintiff could have simply avoided all this subterfuge of filing multiple collateral suits by raising all his allegations by way of a counterclaim in the D3 suit, (see *Permodalan Plantations Sdn Bhd v. Rachuta Sdn Bhd* [1985] 1 MLJ 157, *Lesco Development Corporation Sdn Bhd v. Malaysia Building Society Bhd* [1988] 2 MLJ 184, *Gasing Heights Sdn Bhd v. Aloyah Abdul Rahman* [1996] 3 CLJ 695, *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 2 MLJ 425 and *Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd* [1999] 4 CLJ 533 CA.

For the reasons stated above, I dismiss the plaintiffs appeals with costs.